NO. 82-1994

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KIRBY FOREST INDUSTRIES, INC.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER

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Responding to the Brief for the United States, Petitioner respectfully submits:

1. The Government's assertion that either possession or control by the condemning authority is a prerequisite for a "taking" is contrary to the established body of law that mere interference with property rights may amount to a taking.

2. The Government's stress on Congressional intent in the taking analysis is misplaced; what a taking is and whether it has occurred are *judicial* determinations.

3. The Government's effort to turn the "just compensation" question in a condemnation action into an inverse *condemnation* question, thereby requiring the landowner to file a second suit in order to assert that a taking occurred prior to payment of the award, is a blatant attempt further to burden the landowner and the courts by requiring a multiplicity of suits.

4. The Government's contention regarding multiple valuation hearings aggravates the already present delays and points up the weaknesses of the system under § 257.

5. The Government's contention that timber-cutting is the only purpose for which the property in question was being held is contrary to the record: the District Court found that other highest and best uses were rural subdivision or recreational development.

6. The Government's position promoting self-help by landowners in order to provoke the filing of a declaration of taking is not only contrary to the intent of Congress that the wilderness should be preserved but is an alarming invitation either for on-site confrontations with preservationists or for the landowner to suffer the public consequences of despoiling the natural conditions sought to be preserved and is a subversion of the "government of laws" concept on which this Nation is based.

I. The Government's Absolutist Position on What Constitutes a Taking is Untenable.

The Government says that a taking cannot occur in a straight condemnation prior to payment of the award

unless it has, prior to such time, obtained control over the property or has, by "actual seizure," entered into possession (Brief of Government, pp. 12, 25). It equates "appropriating some substantial interest in the property to its own use" with exercising "dominion and control" (*id.*, p. 12). Other than such an actual invasion, a taking occurs, as far as the Government is concerned, *only* on "the date at which the rights to possession and payment accrue" (*id.*, p. 18, n.19).

The Government does not address, and therefore ignores:

1. Petitioner's contention that the filing of the complaint is a direct, material and adverse interference with the ownership interests in the property.

2. The substantial body of law which has firmly established that actual possession and control are not prerequisites to a taking. See *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978), *Kaiser Aetna v. United States,* 444 U.S. 164 (1979), *United States v. General Motors Corporation,* 323 U.S. 373 (1945), *United States v. Dickinson,* 331 U.S. 745 (1947) and *San Diego Gas & Electric Company v. City of San Diego,* 450 U.S. 621 (1981, dissenting opinion of Mr. Justince Brennan).[1]

3. Petitioner's contention that it is the deprivation of the owner and not the accrual of an interest in the sovereign by which a taking is measured. See *United States v. General Motors Corporation, supra.*

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1. It is noteworthy that with the exception of *Penn Central, none* of the above cited cases, all of which are discussed in Petitioner's Brief, is discussed by the Government. *General Motors* is cited by the Government (p. 36), but not on any of the propositions for which Petitioner cites it.

4. The concept that a taking may be temporary, developed in Justice Brennan's dissent in *San Diego Gas & Electric, supra.* See also *United States v. Dow,* 357 U.S. 17 (1958), *Kimball Laundry Co. v. United States,* 338 U.S. 1 (1949).

5. The concept that a taking may be partial, i.e. of less than full title even while the effort is being made through condemnation to take the full title (the *"de facto* taking" concept), also developed by Justice Brennan in *San Diego Gas & Electric, supra.* See also *Drakes Bay Land Company v. United States,* 424 F.2d 574 (Ct. Cl., 1970).

The failure of the Government to address such matters, which are obviously material, if not absolutely vital considerations to the decision at hand, can only mean that the Government has no basis for controverting them except by asserting the absolute and altogether unsupportable position that nothing short of actual possession, control or passage of title can constitute a taking. Such a position is obviously contrary to the existing authorities, some of which are noted above. The Government attempts to support its position, however, by reference to a so-called "legislative scheme" (Brief, p. 16). The apparent suggestion is that because Congress intends under § 257 that no taking is to occur prior to payment, that means that no taking can occur prior to payment. The absurdity of such suggestion is obvious. That Congressional intent is to achieve the acquisition by the least expensive means —although laudatory from the public's point of view— is not material to the Constitutional mandate that just compensation must be paid for the acquisition. See *Shoemaker v. United States,* 147 U.S. 282 (1893), *Albert Hanson Lumber Co. v. United States,* 261 U.S. 581

(1923), *Barnidge v. United States,* 101 F.2d 205 (8th C.A., 1939).

The only other basis suggested by the Government as support for its position is *Danforth v. United States,* 308 U.S. 271 (1939). *Danforth* has been dealt with at length in Petitioner's Brief (see pp. 18-20). In response, the Government, first, takes issue with one of the distinctions noted by Petitioner between this case and the situation in *Danforth.* Kirby contends in its Brief that the statutes underlying each condemnation "differ markedly" (Pet. Br., p. 18). The Government does not accurately interpret this ground for distinction. The condemnation authorized by the Flood Control Act in *Danforth* was not for the purpose of wilderness preservation, nor was more than a flowage easement contemplated, which would not deprive the owner of all economically viable use of his property. Here the purpose of the condemnation—the stifling of all economic use of the property—was accomplished by the negative restraint inherent in the pendency of the condemnation proceedings. The statutes are obviously different in these respects.

Second, the Government contends that no point in time can be established as a taking date where the "appropriation to public use" is said to be accomplished by the preservation of the property in its original condition (Brief, pp. 21-22). Aside from the fact that such contention is based upon the Government's myopic view of the taking issue, it is clearly contrary to the basic precept of eminent domain that one landowner should not bear the burden of the proposed governmental enterprise. To argue, as the Government in effect does, that the public benefit of preserving the property is *not* accomplished at the time

of the filing of the condemnation is to argue that such public benefit is to be borne alone by Kirby.

Third, the Government justifies *Danforth* as controlling here by contending that the effects on Kirby's property rights of which it here complains are "(m)ere fluctuations in value" and are "incidents of ownership" (Brief, p. 21). Kirby does not assert that "fluctuations in value" provide the basis for its claim. Kirby's contention is that the interference imposed by the condemnation proceeding deprived it of all economically viable uses and investment-backed expectations relating to the property, thereby subserving a sufficient number of the sticks in its property rights bundle to the interests of the public, *see Kaiser Aetna v. United States, supra,* to require a finding of a taking. These deprivations are not "incidents of ownership" or "fluctuations in value."[2]

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2. Nor are these burdens "incidental effects" of the exercise of the power of eminent domain. The cases cited by the Government for such proposition (Brief, p. 25) do not support it. Thus, in *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958), ". . . the damage to the mine owners was incidental to the Government's lawful regulation of matters reasonably deemed essential to the *war effort* . . ." (emphasis supplied) and did not involve a condemnation. *Omnia Commercial Co. v. United States,* 261 U.S. 502 (1923), a war-time requisition case, involved a contract which the requisition terminated, but did not appropriate. It also was not a condemnation case. *United States v. Grand River Dam Authority,* 363 U.S. 229 (1960), involved a conflict between State and Federal powers, and "the frustration of an enterprise by reason of the exercise of a superior governmental power", without appropriation of "any business, contract, land or property . . ." 363 U.S., at page 236. It also did not involve the exercise of the power of eminent domain. In none of the cited cases was there involved the specific purpose of condemning the property. That which might be "incidental" to the exercise of a different governmental power loses its incidental nature (if it has such a nature) in an eminent domain proceeding, where the very purpose of the action is to take the property, and particularly where the "incidental" effect accomplishes the very purpose of the exercise of the power.

Finally with respect to *Danforth*, it must again be noted that the Government does not address the possibility here that some event or events or effects of governmental actions "in actuality" placed burdens on Kirby's property rights prior to the payment of the award. Such ostrich-like stance is a patent refusal to consider the plain holding of *Danforth* that a taking can occur prior to the payment of the award. *Danforth* does *not* hold that either possession (or "control") or the payment of the award *must* occur in order to find a taking in a straight condemnation case. *Danforth* therefore does not support the absolute position taken by the Government.[3]

The Government's position regarding the necessity of "control over the property" in order to find a taking leads it to the further conclusion (Brief, p. 27) that "(t)he institution of legal proceedings is not sufficient by itself to achieve the result sought as the ultimate outcome of those very proceedings." It then asserts that Petitioner's contention would deprive the Government of its opportunity to determine the price and would prevent it from dismissing the action under Rule 71A, Fed. R. Civ. P.

Neither such result occurs under Petitioner's contention. The Government simply refuses to consider the temporary taking concept, which is at the heart of Petitioner's proposal that a taking requiring compensation can occur without passage of title, i.e. without accomplishing the "ultimate outcome of those very proceedings." The "horribles" suggested by the Government simply do not come

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3. As for "control," if the Government wants to exert it at the outset of the proceedings, under the analyses proposed by Kirby, it would be entitled to do so. The onus of the decision of whether to complete the taking should be on the Government and not the landowner.

about. As explained at length in Petitioner's brief (see Pet. Brief, pp. 48-49), the Government at all times prior to payment of the award and passage of title maintains the right to dismiss (which is its right if the price is not acceptable), which Petitioner does not dispute, subject to the payment of just compensation for any temporary or partial taking, and subject to the dismissal provisions of Rule 71A.

Relating to the improved - unimproved dichotomy, the suggestion by the Government that a taking based upon a denial of economically viable use "assumes that unimproved land is necessarily held for speculative purposes, while improved land is not" (Brief pp. 27-28), is a straw-man argument. No such assumption is present in the analysis presented by Petitioner. The distinction rests on no more complicated a fact than that in one case property is productive of income while in the other it is not productive of income. In the case of unimproved property, a condemnation action may deprive an owner of all economically viable use, while in the case of improved, income-producing property, the owner may continue to receive economic benefits (although perhaps at reduced levels) during the pendency of the condemnation and therefore not be deprived of "all economically viable use".

Nor does the suggested rule (under any of the analyses suggested by Petitioner) operate as a windfall to owners of income-producing property (as the Government suggests, Brief, p. 29). Under a rule applicable to all straight condemnations, as noted by Petitioner in its Brief (pp. 46-47), if the landowner continues to receive economic benefits during the pendency of the condemnation, such benefits would reduce (or perhaps even supplant) any interest which might otherwise be due.

II. The Taking Question is a Judicial, not Congressional, Determination.

In several portions of its Brief, the Government purports to stress the intent of Congress regarding condemnation procedures as having (apparently) strong, if not controlling, influence on the taking question. Thus, reference is made to:

1. A statutory alternative to straight condemnation (40 U.S.C. § 258a, see Brief, p. 11);

2. Congressional directives to use the declaration of taking procedure only in emergency situations (*id*);

3. The alleged conformity of the judgment of the Court of Appeals to the "evident congressional intent" (*id.*, p. 16);

4. The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4601 et seq. (*id.*, p. 19);

5. The fact that Congress did not authorize either a legislative taking or a declaration of taking in the act creating the Big Thicket Preserve (except, in the latter case, in the event of an emergency) (16 U.S.C. § 698, Brief p. 24).

Such matters are interesting, and certainly demonstrate that Congress is watching the purse strings, but they have utterly no bearing on whether a taking occurred in this case prior to the payment of the award. The effect of the pendency of the condemnation is what it is irrespective of Congressional intent and whether that effect is a taking is a judicial question, *Shoemaker v. United States*, supra; *Monongahela Navigation Co. v. United States*, 148 U.S.

312 (1893); *Seaboard Airline Railway Co. v. United States,* 299 U.S. 581 (1923); *Albert Hanson Lumber Company v. United States,* supra, and *Davis v. Newton Coal Co.,* 267 U.S. 292 (1925), as to which the desire of Congress to limit expenditures or to provide statutory alternatives is immaterial.

III. The "Taking" and "Just Compensation" Issues are Triable in One Action.

The Government suggests (Brief, pp. 24-25) that to the extent Kirby's claim is for an interference with property rights prior to payment of the award such claim is as one for an actual seizure, i.e., an "inverse condemnation" claim, as to which the jurisdiction of the District Court is limited to claims not exceeding $10,000.00 (28 U.S.C. § 1346). The Government thus openly hints, without citation of authority, that any claim regarding the effects of the exercise of the power of eminent domain where the "damage" is in excess of $10,000.00 must be tried in a separate action in the Court of Claims.

The contention that the taking and just compensation issues must be tried piecemeal in separate actions in a case of this nature is spurious. The Government would equate the effects of its effort to condemn with interferences not involving the power of eminent domain. Thus, as noted by Justice Rehnquist for the Court in *United States v. Clarke,* 445 U.S. 253 (1980) (cited by the Government):

> The phrase "inverse condemnation" appears to be one that was coined simply as a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property *when condemnation proceedings have not been instituted.* . . . A condemnation proceeding, by contrast, typi-

> cally involves *an action by the condemnor to effect a taking and acquire title.*

(445 U.S. at p. 257, emphasis supplied.)

It is one thing to cause damage to property rights in the exercise of a regulatory power, or the war power, for instance, in which event the Tucker Act requires the claim, if substantial enough, to be brought in the Court of Claims, but it is quite another thing for the Government to seek to condemn property, to institute suit therefor, and then claim that the effects of the exercise of its power to take amount to an "inverse condemnation".

No authority is cited by the Government for the startling proposition that the entirety of the taking and just compensation issues are not to be tried in the condemnation action instituted by it where the landowner claims that the taking occurred at a time prior to the payment of the award. *Clarke* does not support such a proposition. Many cases exist (see, eg. *Danforth, Brown v. United States,* 263 U.S. 78 (1923), and other cases cited on page 41 of Petitioners Brief) in which essentially the same type of question is raised as here: when, in a condemnation proceeding, did the taking occur? The fact that none of such cases holds that the actions of the Government while pursuing a condemnation effort which are alleged to be a taking can only be litigated in a separate suit by the landowner, not only undermines the Government's position, but may be said to establish the contrary by the long acceptance of the practice of including all taking and just compensation issues in the condemnation proceeding.[4]

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4. It would be only in the situation where the Government dismisses or abandons the condemnation that the landowner would be required to resort to the Court of Claims for the recovery of his damages, subject to the possible applicability of Rule 71A to the dismissal in the District Court.

IV. The Valuation "Solution" Urged by the Government Only Aggravates the Problem.

While recognizing that the date of taking establishes the date of valuation and that the trial date often bears no relationship to the usually subsequent date of taking (Brief, p. 15), the Government suggests that the solution, where there is a delay in payment, is to have a subsequent valuation hearing. Petitioner submits that this time-consuming and expensive procedure would not be necessary if a firm date of taking is established early in the proceedings. The correct and final valuation date should be known at the time of the first (and hopefully, only) valuation hearing. The Government's suggestion would only add to the burdens of already crowded court dockets. It would also create insuperable problems where the value of the property has been affected by the project itself: improvements may have deteriorated or the value of the property (improved or unimproved) may have decreased by reason of inclusion in or the proximity of the project. The point is, the landowner should not be required to undergo the tortuous ritual proposed by the Government when a fairer procedure can establish the rights of the parties as of a definite, ascertainable time early enough in the proceedings to allow the trial to be conducted with a definite date of taking.

Petitioner is fully aware (contrary to the Government's observation in note 24, p. 23) that the establishment of an early date of taking establishes an early valuation date and that in a rising market a greater value may be ascertained at a later date. However, when faced with the prospect of multiple trials, any landowner—as should the Government—would prefer the definiteness of a certain

valuation date plus interest on the award through the date of payment rather than to ride the vagaries of the market.

In the same footnote, the Government incorrectly states the result of the earlier valuation on the obligation of the Government to pay, urging, in straw-man fashion, that interest would be due on a later, higher valuation back to an earlier date of taking, resulting in a "double recovery". The problem with such assertion is that there is no later, higher valuation. Petitioner of course does not contend that any valuation other than that determined as of the earlier date of taking would be applicable, and any interest would be payable only on such early valuation.[5]

The Government's contention that there is a distinction between market value and interest within the concept of just compensation does not establish that interest is not an appropriate measure of just compensation. Such contention, first, presumes that the date of taking must be subsequent to the date of valuation and that there must be a second valuation hearing—a situation which adoption of Kirby's contention here will correct—and, second, is inconsistent with this Court's views, expressed in *Seaboard Airline Ry. Co. v. United States,* 299 U.S. 581 (1923), *United States v. Rogers,* 255 U.S. 163 (1921),

5. The Government also appears to be asserting in such footnote that the stipulation made by the parties does not permit the question of alternative valuation dates to arise in this case. If that is the contention, then the Government is telling us that it is not bound by a date of taking stipulation but that Kirby is bound by a date of valuation stipulation. The effect of such a contention would be to deny to Kirby the just compensation due from a subsequent valuation date in the event the taking date urged by the Government is approved by this Court. Such a contention is wholly inconsistent with the Government's position that a subsequent valuation hearing is appropriate here.

Phelps v. United States, 274 U.S. 341 (1927) and *Jacobs v. United States,* 290 U.S. 13 (1933), that "interest" is "a good measure" by which to ascertain "such addition as will produce the full equivalent of that value paid contemporaneously with the taking." 261 U.S. at p. 306.

Finally regarding the valuation questions, the Government urges (Brief, p. 16, n.16) that Petitioner suggests that a problem is caused *because* payment and taking are simultaneous. What Petitioner actually urges is that the problem occurs where *valuation* and taking are *not* simultaneous and that if valuation is determined at a date earlier than the taking (whether or not the taking is at the date of payment of the award) then compensation is not just because Petitioner (absent the payment of interest) has not been paid the value of its property at the time of the taking.[6]

V. The Taking Here is Not of Just an Expectation to Harvest the Timber, But of All Expectations and All Economically Viable Uses.

The Commission found (R. 480) and the District Court adopted the finding (J.A. 21) that the highest and best use of the property condemned was "varied, as portions of it are best used for rural subdivision, waterfront housing and recreational, timber growing and sand pit operations."

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6. Petitioner does not assert, as urged by the Government, that § 258a "provides the only procedure that accords constitutionally adequate protections to the landowner." As pointed out in its Brief (p. 47), Petitioner recognizes that the Government has a choice between the different methods of condemnation. If it selects § 257 it may delay the payment of the award but, under Petitioner's suggested rule, interest will be accruing during such period of delay.

The effort by the Government to limit the investment-backed expectations to the cutting of timber is unavailing. (Brief, p. 31) Because the greatest return (development for subdivision and recreational use) would require the trees to remain standing, it cannot be presumed that Kirby would have destroyed the highest value by the destruction of the trees. But whatever the use to which the land may have been put, the sticks from Kirby's bundle of property rights which the condemnation action foreclosed included the ability to sell, to sell for development, to develop, to sell the timber, to cut the timber and to mortgage the property. These matters go beyond the effects held not to be takings in *Andrus v. Allard,* 444 U.S. 51 (1979) (prohibition of sale of eagle parts; *query:* Does the Government suggest that a flat prohibition on the sale of *land* would *not* be a taking?) and *Miller v. Schoene,* 276 U.S. 272 (1928) (destruction of trees on nuisance basis to protect nearby commercial apple trees) and are not mere reductions in value as involved in *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926) and *Hadacheck v. Sebastian,* 239 U.S. 394 (1915), cited by the Government. The effects of the condemnation *totally* deprived Kirby of any viable economic use. Under current taking analysis, these effects constituted a taking. See *Penn Central,* supra.

The Government also misperceives the importance of the moratorium (Brief, p. 32). Kirby does not refer to it as an event which "took" its property, but as an event on which Congress relied in the removal of the legislative taking provision from the bill then before it (S. Rep. No. 875, 93d Cong. 2d Sess. U.S. Code Cong. & Ad. News, 5558). If "fairness" is to be served in the taking process, the cooperation extended to the Government by Kirby

should be considered. In this respect, the fact that the Government now claims that such cooperation amounted to a donation (Brief, p. 32, n.33) is nothing short of astounding.

VI. The Government's Suggestion that the Landowner Must Provoke a Taking is Lawless and Irresponsible.

The Government offers (Brief, pp. 35-37) two alternative remedies to the taking analysis urged by Petitioner. It suggests that a landowner could (1) seek to enjoin the Government from "activities that adversely affect his property" (*id.* p. 35) or (2) provoke the Government into filing a Declaration of Taking under § 258a by engaging in on-site activities contrary to the purpose of the condemnation (*id.*, p. 36) (suggesting that the Government would "probably" have filed the declaration here if Kirby had ended the moratorium by cutting the trees).

These suggestions are both amazing and in the latter case, shocking. First, it is obvious that no injunction would be granted preventing the Government from filing and pursuing its condemnation suit—for it is the effect of such a suit, and not physical activities on the premises which "adversely affect (the) property" in this and similar cases.

Second, the suggestion of self-help remedies by the landowner only serves to demonstrate the inadequacies of the system under § 257. Such suggestion (1) violates the intent of Congress and its directive to the Interior Department that the land is to be preserved in its original condition, (2) promotes confrontations between citizens

who want the land preserved and the landowner who desires to exercise his right to use his property (a right supported by the Government's suggestion made to this Court), (3) places squarely on the landowner the opprobrium of the despoilation of the wilderness, and (4) subverts the rule of law and its processes as the proper means of resolving conflicts between the Government and the citizens of this country.

These factors, resulting from contentions made to the highest Court in the land by the Justice Department of a government presumably premised on the rule of law, amply demonstrate the need for a decision here which protects the interest of the landowner from excesses practiced by the sovereign. Based simply on a fairness standard, it is wholly unfair that the Government should be entitled to initiate condemnation proceedings, to delay payment of an award and then contend, after the award is paid and the land unquestionably taken, that the landowner should have acted in a lawless fashion—contrary to the will of Congress—in order to protect his rights. The system which would allow such thinking must be changed. Clearly, under the taking analyses urged by Petitioner, such results could not occur.

CONCLUSION

The Government, in essence, bases its position before this Court on a stilted reading of *Danforth* and nothing more. Its efforts to reply to Petitioner's salient points are mere dissemblance, without substance. Petitioner respectfully submits that its contentions correctly set forth the law and policy which under the Fifth Amendment control

the determination of the questions before the Court. The judgment of the Court of Appeals should be reversed.

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